

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs January 30, 2007

**STATE OF TENNESSEE v. CHEDRICK FITZGERALD**

**Appeal from the Circuit Court for Blount County**  
**No. C-12799     D. Kelly Thomas, Jr., Judge**

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**No. E2006-00985-CCA-R3-CD - Filed March 13, 2007**

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The defendant, Chedrick Fitzgerald, appeals from the Blount County Circuit Court's probation revocation for his eight-year sentence for possession with intent to sell one-half gram or more of cocaine, a Class B felony. He claims that imposition of the full eight-year sentence is too harsh a punishment given the evidence. We hold that the trial court did not abuse its discretion and affirm its judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee (on appeal), and Raymond Mack Garner, District Public Defender (at trial), for the appellant, Chedrick Fitzgerald.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Michael Gallegos, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The defendant's original sentence was imposed on March 11, 2002, and involved ninety days in jail with the balance to be served on probation. A violation warrant issued on July 13, 2004, alleged the defendant had been arrested for domestic assault. The warrant was later dismissed. A second violation warrant was issued on August 31, 2005, which alleged that the defendant was arrested on June 5, 2005, for violating an order of protection, that he did not report the arrest to his probation officer, and that he failed to appear in court on August 11, 2005. The warrant also alleged that the defendant failed to maintain and report employment, failed to report a change of residence, failed to report to the probation office as scheduled, and failed to pay fees and costs. The trial court found the defendant in violation on November 28, 2005, and ordered that he serve 120 days in jail and then be transferred to intensive probation.

The present violation warrant issued on April 11, 2006. It alleged that the defendant had not obtained employment, had not reported his change of residence, tested positive for tetrahydrocannabinol (THC) and admitted using marijuana, failed to report to the probation office as scheduled, and failed to pay probation fees.

In support of the state's allegations, Marcus Miller, the defendant's probation officer, testified that the defendant had attempted to deceive him about whether he was employed. Mr. Miller said that he called the person the defendant identified as his employer and that although the person initially said that the defendant worked for him, he called back and said he did not. Mr. Miller testified the defendant claimed that the employer's wife did not like the defendant and that the employer might have denied employing the defendant to avoid his wife's ire. Mr. Miller also testified that he went to the address at which the defendant had reported living, but he was told by another resident that the defendant and his girlfriend had moved. Mr. Miller said he received an anonymous telephone call in which the caller told him the defendant was using an artificial device filled with someone else's urine to pass drug screens. Mr. Miller testified that he asked the defendant about this and that the defendant denied it. After Mr. Miller initiated a drug test, the defendant admitted he had such a device and had smoked marijuana. Mr. Miller said the defendant's drug test was positive for THC. He said that he counseled the defendant about drug treatment and that the defendant put himself on a waiting list for treatment. Mr. Miller said the defendant failed to report twice in the eight weeks he was being supervised on intensive probation and failed to pay any of his probation fees, although he had made a payment on court costs.

The defendant testified, offering explanations for his shortcomings on probation. He admitted he had moved but said that there was no telephone at his new residence and that he had notified Mr. Miller of his new residence when he had been able to borrow a cellular telephone. He said he was shocked when his employer denied that the defendant worked for him. The defendant said that work had been slow but that he was working about three days a week making \$120 to \$200 weekly. The defendant admitted he had attempted to defeat a drug test with an artificial device which he had repainted to match his skin color and filled with his girlfriend's brother's urine. He said he did so because he had smoked marijuana on two occasions and did not want to get caught. He said he knew he had a substance abuse problem and had turned to marijuana after stopping prescription medication for depression. The defendant testified he wanted to get drug treatment and had moved into his father's home to get away from the drugs at the house where he had been living. He said his depression was responsible for the periods of non-compliance with the terms of probation, and he asked the court to give him another chance at a sentence not involving confinement.

The trial court found that the defendant had not demonstrated an inclination to abide by the terms of probation. The court noted that the defendant had already received a second chance on his prior revocation. The court revoked the defendant's probation and ordered him to serve his sentence in prison with credit for prior jail service.

The defendant argues in this appeal that the trial court should not have imposed service of the entire sentence upon finding that the defendant was in violation of his probation. Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, in State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991), our supreme court stated:

We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment. State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984).

Upon consideration, we hold that the trial court's determination that the defendant had violated the terms of probation was supported by substantial evidence and that the trial court did not abuse its discretion in revoking his probation and ordering him to serve his sentence in prison. The defendant had been given a prior reprieve when he violated the terms of probation, and after only a few weeks from his jail release for that violation, he had once again amassed more violations of the terms of his probation.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE